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No. 06-427

In The
Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,
Petitioner,
v.
BRENTWOOD ACADEMY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF CENTER FOR EDUCATION REFORM and EXCELLENT EDUCATION FOR EVERYONE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

This brief will address the second question presented:

Whether the Sixth Circuit correctly held that TSSAA violated the First Amendment and Due Process rights of Brentwood Academy when its rules impose limitations on the content of communications between Brentwood Academy and students who had entered into contracts to attend Brentwood and their parents, and imposed penalties, including a monetary fine, for violations of those rules.

RULE 29.6 STATEMENT

Amici are not-for-profit corporations.

None of the *amici* have parent or subsidiary corporations and are not issuers of any class of stock, and no publicly held corporation owns 10% or more of the stock of any of any of the *amici*.

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BRIEF *AMICUS CURIAE* OF CENTER FOR EDUCATION REFORM and EXCELLENT EDUCATION FOR EVERYONE, IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE* [1, 2]

The **Center for Education Reform** ("CER") is a national, independent, non-profit advocacy organization that creates opportunities for and challenges obstacles to better education for America's communities. CER advances substantive reforms that produce high standards, accountability and freedom of choice. CER is a full-service education reform engine that works with diverse constituencies to restore excellence and equity to America's public schools.

Excellent Education for Everyone ("E3") is a coalition of New Jersey citizens from across the political spectrum, of all races, all religions, and all ethnic groups, and all regions of the State of New Jersey. E3's goal is to ensure that all parents, regardless of income, have the power and resources to determine where and in what way their children will be educated. E3 supports programs designed to improve public schools by subjecting them to the competitive pressures of parental school choice.

STATEMENT OF THE CASE

The TSSAA is an association of 290 public schools and 55 independent and parochial schools from across the state of Tennessee. The TSSAA is organized for the purpose of stimulating and regulating interscholastic athletic competition among its member schools. The Tennessee State Board of

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[1] Petitioner, by letter dated October 20, 2006, and Respondent, by letter dated March 21, 2007, have consented to the filing of *amicus* briefs in support of Respondent.

[2] In accordance with Rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and no person or entity other than *amici* has made a monetary contribution to the preparation or submission of this brief.

Education has explicitly acknowledged the TSSAA's functions "in providing standards, rules and regulations for interscholastic competition in the public schools of Tennessee" for over 80 years. *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 292 (2001). In 1972, the Board designated the TSSAA as "the organization to supervise and regulate" interscholastic athletics and specifically approved the TSSAA's rules and regulations. *Id.*

The TSSAA has promulgated a "Recruiting Rule," found in section 21 of the TSSAA's Bylaws[3]:

> The use of undue influence on a student (with or without an athletic record), his or her parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule.

Brentwood Academy v. Tennessee Secondary School Athletic Association, 304 F. Supp. 2d 981, 984 (M.D. Tenn 2003).

The bylaws also include a number of questions and answers and other guidelines that are known as "interpretive commentary." The interpretive commentary includes the following:

1.

> Q. How is undue influence interpreted in the recruiting rule?
>
> A. A person or persons exceeding what is appropriate or normal and offering an incentive or inducement to a student with or without an athletic record.

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[3] Sometimes referred to hereafter as the "Recruiting Rule" or the "Rule."

3.

Q. Is it permissible for a coach to contact a student or his or her parents prior to his enrollment in the school?

A. No, a coach may not contact a student or his or her parents prior to his enrollment in the school. This shall apply to all students whether or not they have an athletic record.

4.

Q. What are some of the guides [sic] used in determining whether there has been undue influence used which would result in a violation of the recruiting rule?

A. Some examples are, but not limited to:

***

3. Any initial contact[4] or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern.

4. Any initial contact or prearranged contact by a member of the coaching staff or representative of the

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[4] Although" examples" 3 and 4 use the phrase "initial contact," paragraph 1 of the "Guidelines for Understanding The 'Recruiting Rule' and Understanding 'What Is Undue Influence?'" states:

> 1. The major theme of the "recruiting rule" is not "initial contact." The major theme is "exceeding what is normal and appropriate." Initial contact can be a violation, but is only one of many things that can exceed what is normal and appropriate.

> school and a prospective student/athlete in the seventh grade and above at any non-member school except where there is a definite feeder pattern involving the schools.
>
> . . .
>
> Private or parochial schools may not contact students enrolled at the public schools. Public schools may not contact students enrolled at the private schools.
>
> ***
>
> 7. Admitting students to athletic contests free of charge when there is an admission being charged at the contest except where there is a definite feeder pattern involved with the school.

See 304 F. Supp. 2d 981, 985 (M.D. Tenn. 2003) and *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 442 F.3d 410, 416-417 (6th Cir. 2006).

Brentwood Academy is an independent school in Brentwood, Tennessee, and a member of the TSSAA. In 1998, the school had about 520 students in grades six through twelve. "The 'definite feeder pattern' exception does not apply to Brentwood, except with regard to those students who are enrolled at Brentwood Academy itself in the sixth grade or higher." 442 F.3d 410, 416-417.

Brentwood Academy was penalized severely by TSSAA, previously found by this Court to be a governmental actor, for violating a rule regulating communication about a legitimate school activity offered by Brentwood because Brentwood's communication allegedly involved "undue influence," that is "exceeding what is appropriate or normal." 304 F. Supp. 2d 981, 984; 442 F.3d 410, 416-417. The phrase "appropriate and normal" and its component words are not defined in the Recruiting Rule or in the questions and answers and other

guidelines that are known as "interpretive commentary."[5] *See* 442 F.3d 410, 416.

In April 1997 Brentwood's football coach sent a letter to all entering eighth grade boys, without regard to their prior athletic activity or interest (304 F. Supp.2d at 989), inviting them to the team's spring practice. The coach subsequently made phone calls to the families of the boys to whom the letter was sent to clarify that the spring practice was not mandatory and should not take precedence over any other academic or athletic responsibilities the boys might have at their middle school. 442 F.3d 410, 417-418. The students and families receiving the letter and clarifying telephone call from the coach had previously visited the school, the students had applied for admission to Brentwood, had been tested, had been accepted for enrollment, and had committed to attend Brentwood in the fall. *Id.* at 418.

The letter from the football coach informed incoming students of optional spring football practice, a permissible activity. Incoming Brentwood students received a variety of information about "a multitude of topics" including academics and the letters and calls should be seen in this light." 442 F.3d 410, 429.

As the trial court found, the letter and phone calls were informational speech about a permitted athletic practice from a private school to all the parents of all the male students who had applied, taken admissions tests, had been admitted to the school, and had signed contracts with Brentwood. The studentsand their parents had already decided that Brentwood

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[5] The questions and answers and other guidelines that comprise the "interpretive commentary" are referred to hereafter as the "Guidelines." The "interpretive commentary" is meant to aid in the interpretation of the recruiting rule, they are not binding on the TSSAA Board of Control. 442 F.3d 410, 416.

was their school of choice. 304 F. Supp.2d 981, 995, 442 F.3d 410, 428-29.

SUMMARY OF ARGUMENT

School choice is vital, and has been recognized by the federal government and most state governments as an essential way to improve elementary and secondary school education. Parents and students are entitled to a free flow of information regarding all aspects of schools' programs so they can make informed choices and determine the right school and the program for their children.

The TSSAA Recruiting Rule interferes with the flow of essential accurate information from schools to parents and students.

The Recruiting Rule is not content-neutral, goes far beyond regulation of the "time, place and manner" of the school's speech. While TSSAA, as a surrogate for the state, has a substantial interest in ensuring that athletics is subordinate to academic pursuits and to protect student athletes from "exploitation," its Recruiting Rule is narrowly tailored to achieve those purposes.

ARGUMENT

This case is not just about pushups, pass patterns and high school football. The rule of law established here will spill over into other aspects of communication between schools and parents and students about school offerings -- not just athletics -- band, debate, drama and other activities that make up the total educational experience. This is also about competition for students between traditional public and alternative providers of education services, and the ability of schools that offer such education alternatives to compete on a level playing field with

other schools and effectively to offer real choice to students and parents.

More broadly, this case will have significant bearing on the accountability of public school officials who seek to avoid public scrutiny of their performance in educating the nation's children and to limit parents' ability to compare the performance of traditional public schools with the performance of alternative educational institutions.

Recognizing the impending national crisis posed by failing public schools, substantial and far-reaching reforms have been initiated by states and by the federal government in recent years. That many public secondary schools have not been adequately educating the nation's young people has been widely acknowledged. *See, e.g.*, U.S. Dept. of Education, "A Nation At Risk" (1983), a seminal study calling for dramatic education reform because of our failing schools, available at http://www.ed.gov/pubs/NatAtRisk/index.html.

It is now accepted by many, including more than 40 state governments that have enacted charter school legislation, that competition among district-based public schools, charter schools, magnet schools, independent schools and other educational alternatives benefits students at each type of teaching institution. The federal government has also recognized that competition among primary schools and secondary schools enhances the quality of education. In addition to zoned public schools and independent schools[6] current school choices include magnet schools (some of which are curriculum oriented, emphasizing, *e.g.*, mathematics, science, arts, or literature) ; liberal transfer policies among public schools based on curricula; open enrollment; charter

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[6] The term "independent school" usually includes religious schools, single gender schools, and private day schools and boarding schools.

schools; and transfer from low performing public schools pursuant to federal law.[7]

Secretary of Education Rod Paige emphasized that choice fosters competition and encourages improvement:

> Choice fosters competition. It injects market forces into an education system that has been a virtual monopoly and stagnant.
>
> ***
>
> . . . [T]here needs to be multiple delivery systems for education -- healthy market competition. Those options include private schools, home schools, cyber schools, parochial schools. And those options should be available to all parents.

U.S. Secretary of Education Rod Paige, Address to Cato Institute, http://www.ed.gov/news/speeches/2004/05/05112004.html.

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[7] Title V, Part B, Subpart 1 of the No Child Left Behind Act,, P.L. 107-110, 115 Stat 1425 (2002), 20 U.S.C.A. § 6301, *et seq.* specifically encourages the . . . establishment of public charter schools. "The theory behind charter schools is that these alternative programs will provide educational options to students that are not available within the traditional public school system. At the same time, as public schools compete to enroll students, all schools feel pressure to improve the quality of the educational services they provide. In fact, school choice is a key provision of the Title I accountability provisions in No Child Left Behind. This gives parents and students the right to transfer from a school in corrective action to a public school (including a charter school) that provides a higher-quality education." U.S. Department of Education, *No Child Left Behind: A Desktop Reference* 109 (2002). Title V, Part C of the No Child Left Behind Act provides federal assistance to localities to establish "magnet schools", which "[f]or nearly four decades . . . have been an important element in American public education, offering innovative programs not generally available in local schools and providing opportunities for students to learn in racially diverse environments." *Id.* at 113; No Child Left Behind Act of 2001, P.L. 107-110, sec. 501, et seq., 115 Stat 1425 (2002), 20 U.S.C.A. § 6301, *et seq.*

> The basic tenets of charter schools -- give them room to be innovative, hold them accountable for results, and let parents decide if they meet the needs of their children – are perfectly aligned with the historic No Child Left Behind Act (NCLB), which also focuses on accountability for results in return for more flexibility, and with providing more options for parents than ever before.

U. S. Department of Education, "Innovations in Education: Successful Charter Schools" at 1 (2004) at http://www.ed.gov/admins/comm/choice/charter/report.pdf.

Charters are public schools designed to function free of many bureaucratic regulations to permit innovative education methods (for example, small classes, longer school hours, extended school years, school attire, increased parental involvement) in exchange for increased accountability, in accord with federal policy. *See* No Child Left Behind Act of 2001, *supra*. Charter schools legislation has been adopted in 41 states and the District of Columbia. The number of charter schools has increased twenty-fold in the last 20 years. Approximately 4,000 charter schools currently serve over one million students and their families; this compares with approximately 200 charter schools in existence a decade ago. *See* National Charter School Online Directory, available at http://www.edreform.com/charter_directory/data1.cfm and http://www.edreform.com/charter_directory/data2.cfm.

Extracurricular activities, including athletics, constitute an integral component of an overall education. Such activities provide the basis for leadership skills and physical well-being and they are an important element in motivating young people. *See Brentwood Academy v. Tennessee. Secondary School Athletic Ass'n*, 531 U.S. 288, 299-300 (2001); *see also* S. Black, "The Well-Rounded Student: Extracurricular Activities and Academic Performance Go Hand in Hand," 189 *American School Board Journal* (2002); N. Darling, "Participation in

Extracurricular Activities and Adolescent Adjustment: Cross-Sectional and Longitudinal Findings," 34 *Journal of Youth and Adolescence* 493-505 (2005); M. Zwart, "An Assessment of the Perceived Benefits of Extracurricular Activity on Academic Achievement at Paramount High School," Academic Leadership Live, The Online Journal (2007), available at http://www.academicleadership.org. Many athletes who stay in school or progress to a university setting may be encouraged to study because of their interest in sports. Athletics can provide the exposure to ideas and the motivation to learn. Sports, art, drama, journalism, debating and most other school sponsored extracurricular activities can serve to motivate students and teach them about potential vocations or avocations that will stay with them for life. *See* Black, *supra*. Extracurricular activities in general, and sports in particular, can provide opportunities for children from disadvantaged backgrounds. P. Geary, "'Defying the Odds?': Academic Success Among At-Risk Minority Teenagers in an Urban High School," paper presented at the Annual Meeting of the American Educational Research Association (1988), available at U. S. Department of Education, Institute of Education Sciences, Education Resources Information Center, http://www.eric.ed.gov, ED296055.

I.

THE RECRUITING RULE VIOLATES BRENTWOOD ACADEMY'S FIRST AMENDMENT RIGHT TO FREE SPEECH

A. The Free Flow of Information to Parents and Students Is Essential

Because the widespread availability of educational alternatives is a relatively recent phenomenon[8], parents need to be informed as to the availability of charter and other alternative schools and, of course, how those schools can better serve their children. Public charter schools as well as "magnet" schools must compete for students with other public schools already established in the local geographic school district (to which a student would be assigned automatically), as do independent private schools, church-sponsored schools and home schooling.

Former Secretary of Education Rod Paige has emphasized that choice fosters competition and encourages improvement:

> The [No Child Left Behind] law says parents and taxpayers have a right to information about their local schools and how they compare to other schools. Empowered with this information, parents can vote with their feet and make choices.

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[8] To be sure, private primary and secondary schools have existed since colonial times, and indeed pre-date public schools and parochial or religious schools have also been a factor in primary and secondary education as long. However, these were usually available to the affluent (in the case of private schools) or those belonging to a particular religious denomination (in the case of parochial schools). Charter schools, magnet schools, schools that emphasize a particular set of academic interests, and school vouchers that can be used at private schools are relatively recent innovations to provide school choice to all.

U.S. Secretary of Education Rod Paige, Address to Cato Institute, http://www.ed.gov/news/speeches/2004/05/05112004.html.

The flow of information from schools to parents, as decision-makers, is vitally important to making informed school choices about which school their child should attend and the options available at the school that is ultimately selected.

> For choice to be effective, parents need information about the schools that are available to them, the characteristics of those schools, how the enrollment process works, and the transportation available. Ultimately, parents will want to think about which school would be best for their child, given a range of educational and personal considerations.

U.S. Department of Education, Office of Innovation and Improvement, Innovations in Education: Creating Strong District School Choice Programs (2004), http://www.ed.gov/admins/comm/choice/choiceprograms/report. pdf.

A school's communication with parents and students concerning the school's programs thus touches a vital matter of public concern. In order to compete effectively, alternative schools must be able to inform parents and students of the full range of programs they offer: academic, extracurricular, and financial aid, and parents and students need all of this information to be able to make informed choices. The flow of information from schools to parents, as decision-makers, is essential to enable them to make informed school choices about both which school their child should attend and the options available at the school that is ultimately selected. *See* 304 F. Supp. 2d 981, 989).

As the district court said in its decision at an earlier phase of this case, "In the competition among schools for students, the First Amendment prohibits the State from favoring one side of

the debate by suppressing the speech of the other." *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 13 F.Supp.2d 670, 689 (M.D. Tenn. 1998); *see also, Turner Broadcasting System. Inc. v. Federal Communication Commission*, 512 U.S. 622 (1994). It is not only not the business of the State to stifle speech that fosters competition among schools for students, it is contrary to government policy and sound educational practice.

Where school choice is involved, as here, there must be particular concern for those persons pre-enrollment messages are designed to reach: the parents and students. Listeners, as well as speakers, have First Amendment interests that are to be protected. *See, e.g., Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

The flow of information from schools to parents, as decision-makers, is very important to making informed school choices about both which school their child should attend and the options available at the school that is ultimately selected. *See* 304 F. Supp. 2d 981 at 989). The flow of information is important in another respect: charter school legislation in many states requires the charter school to reach out to the community so that the student body reflects the cultural and ethnic diversity of the population the charter serves. *See, e.g.*, New Jersey Charter School Program Act of 1995, N.J.S.A. 18A:36A-8(e).

B. The Recruiting Rule Is Not a Content-Neutral Restriction on Speech

A content-neutral regulation controls the time, place, or manner in which the message is communicated. A content-based regulation controls speech based on what is said. The Recruiting Rule is not content neutral for a number of reasons.

Rules selecting which speakers may address a topic are content-based because they favor one side of the debate by suppressing the speech of the other. The First Amendment prohibits the government from doing this. *First Nat. Bank of*

Boston v. Belotti, 435 U.S. 765, 784-85 (1978) (the state may not dictate "who may address a public issue"); *Hurley* v. *Irish American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (rule regarding the selection of speakers or participants in the parade is a content-based regulation of speech because a parade is a form of speech); *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 640-41.

Further, the Recruiting Rule discriminates against alternatives to traditional district high schools. The Rule and the Guidelines permit traditional district high schools to communicate with incoming students, but silences non-traditional schools. The Rule, as interpreted in the Guidelines, precludes pre-enrollment contact with incoming students except "except where there is a 'definite feeder pattern." *See* "examples" 3, 4, 5 and 7, quoted verbatim at 304 F. Supp. 2d 981, 985). The preference for schools with a "definite feeder patter" permeates the Rule and the Guidelines. Non-traditional schools do not have a "definite feeder pattern."[9]

The Sixth Circuit's reasoning that the Rule was not content-based because while coaches are subjected to special

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[9] While the "examples" may appear to impose similar restrictions on traditional public high schools and independent, parochial or non-traditional public high schools such as charter schools or magnet schools (*See* "example" 4: "Public high schools may contact public feeder schools (elementary, middle school, junior high school. Question and answer "5" is even more explicit: "Q. What is allowed by member schools in contacting prospective students? A. A representative of the school may meet with students at a school that is defined as a feeder school or meet with students who are zoned to attend that school the following year...." "Guidelines for Understanding The 'Recruiting Rule' and Understanding 'What Is Undue Influence?.'") where there is a definite feeder pattern.") In fact there is disparate impact, because independent, parochial or non-traditional public high schools generally do not have a "definite feeder pattern," either because they do not draw their students from defined geographic districts or particular middle schools, or because they (especially charters) are often only recently established.

limits on their speech, they are not completely deprived of the ability to communicate with students:

> Although the rule emphasizes that coaches and members of the coach's staff must refrain from exerting "undue influence" by initiating contact with prospective students, the rule does not ban these persons from communicating with students who themselves initiate contact.

262 F.3d 543, 553.

This reasoning is flawed on several levels. As an initial matter, the commentary to the Rule is not at all clear that only coaches are restricted.[10] It is also not clear whether coaches are permitted even to respond to queries from prospective students. More fundamentally, even if coaches are permitted to respond to questions from students or parents, their inability to say anything about the availability of financial aid without first being asked remains a substantial barrier to meaningful communication. The Rule singles out coaches for more onerous restrictions than others, and the imposed special restrictions on coaches are directly related to their special familiarity with the schools' athletic program.

A rule is also content-based if it prohibits all discussion of a topic or subject, regardless of the speakers' point of view. *See Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 537 (1980); *Arkansas Writers Project, Inc.* v. *Ragland*, 481 U.S. 221, 229-30 (1987).

As interpreted in the Guidelines, the Rule bars any school representative from initiating any discussion with any prospective student if it is "for athletic purposes" and explicitly prohibit coaches from "discussion of financial aid based on

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[10] Several of the interpretive examples refer to coaches and "representatives" of schools.

need" with a prospective student until the student has been at the school for at least three days.[11, 12]

The text of the Rule and the Guidelines make it clear that the Rule is designed to preclude discussion of particular topics. Whether a school representative may speak to a prospective student depends on whether that speech is related to recruitment or athletics. The Rule is explicitly concerned with limiting schools' ability to "secure or retain" students "for athletic purposes." The trial court found that

> the preponderance of the credible evidence at trial is that the substantive "content" of the Spring Practice Letter and calls mattered and was a significant factor in the TSSAA's decision that the letter and calls constituted "undue influence" and violated the Recruiting Rule. The TSSAA penalized Brentwood Academy for the substantive "content" of the Spring

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[11] Question 4, Examples 3, 4 and 5 apply to coaches and "representatives" of a school. Example 2 in the Guidelines states: "Discussion of financial aid based on need with any prospective student/athlete by any member of the coaching staff until the student has enrolled in school (attended 3 days of school). All financial aid questions should be referred to the principal or the person in charge of financial aid. If the person in charge of financial aid is a coach, prior approval must be granted by the Executive Director of TSSAA." 304 F. Supp. 2d 981, 985.

[12] The Court of Appeals was mistaken in stating that the Rule was saved because it "does not constitute a total ban on communications between secondary schools and prospective students regarding athletic programs.262 F.3d 543, 552. *See United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) "[i]t is of no moment that the [rule] does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree . . . . [C]ontent-based burdens must satisfy the same rigorous scrutiny as . . . content-based bans."

> Practice Letter and calls and the message they conveyed in this case.

304 F. Supp. 2d 981, 992 n. 4. The district court was correct.

Finally, a rule adopted in part to avert a potential effect on listeners of the regulated speech is content-based (even if it does not prohibit particular speakers, topics, or viewpoints). *See Forsyth County* v. *The Nationalist Movement*, 505 U.S. 123, 134 (1995); *United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803, 811 (2000). So long as the regulation "has to do with" the content of the speech, it is not content-neutral.[13]

This case is even more compelling than *Forsyth County* because the Rule was adopted explicitly to prevent parents and students who hear it the proscribed speech from being "unduly influenced" by the banned speech (*see* 304 F. Supp. 2d 981, 984; 442 F.3d 410, 416-417), not on a "secondary effect" of the speech.

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[13] In *Forsyth County*, the parade ordinance permitted a government administrator to base the parade permit fee on the estimated cost of maintaining public order. This Court held that the ordinance was content-based because the fee was based on the public's reaction to the message conveyed by the parade.

> The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content. * * * [P]etitioner . . . contends that the ordinance is content neutral because it is aimed only at a secondary effect -- the cost of maintaining public order. It is clear, however, that, in this case, it cannot be said that the fee's justification has nothing to do with content.

Forsyth County, 505 U.S. at 134 (internal citations and quotations omitted).

The effect of a total ban on pre-enrollment speech by "the coaching staff **or** representative of the school"[14] could hardly be more draconian. On its face it prevents students and their parents from learning much about a school's athletic program[15] and the availability of financial aid. In short it prevents parents and students from getting information that is essential to enable them to decide if a school is right for them.

C. The Recruiting Rule Cannot Withstand Strict Scrutiny

Content-based restriction of speech are "presumptively invalid," *R.A.V.* v. *St. Paul*, 505 U.S. 377, 382 (1992). In order to overcome the presumption of invalidity, a state must show "that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project, supra*, 481 U.S. 221, 231 (1987). To be "narrowly drawn," the law must be the "least restrictive means" to further the government's articulated interest. *Sable Communications of California, Inc.* v. *Federal Communications Commission*, 492 U.S. 115 (1989).

1. The Governmental Interest

The district court concluded that there were three state interests supporting the Recruiting Rule: (1) "keeping high school athletics 'in their proper place' subordinate to academics"; (2) "protecting athletes from 'exploitation'"; and

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[14] "Representative of the school" is not defined, but it certainly could include the academic and administrative personnel, *i.e.* those with the most knowledge about the school's academic and extra-curricular programs.

[15] It would also preclude telling the not-yet-enrolled student at a "non-feeder" junior high or middle school or her parents about the school's special academic offerings, such as advanced placement courses, or non-athletic extracurricular opportunities, such as theater, music, debate or other groups, or externship programs, since those might be deemed designed to entice a prospective student-athlete to enroll in that particular school.

(3) "fostering a 'level playing field' between schools for 'competitive equity.'" 304 F. Supp. 2d 981, 994.

In determining the actual governmental interest, and whether that interest is substantial, a court must focus on the "actual interests served by the restriction." *Edenfield v. Fane,* 507 U.S. 761, 768 (1993). The district court held that the TSSAA has a substantial governmental interest in ensuring that high school athletics be "subordinate to education" and in protecting student athletes from "exploitation."

304 F. Supp.2d 981, 994.[16]

The District Court concluded:

> The TSSAA does not have a substantial governmental interest in preventing or discouraging students from moving from one school to another for academic or educational purposes, in whole or in part, in order to foster competitive equity in athletic contests.

304 F. Supp. 2d 981, 994. The Court of Appeals essentially agreed with the trial court's analysis and conclusions regarding the scope of the government's substantial interest. *See* 442 F.3d 410, 426-429.

Two significant government interests are presented: protecting students in their pursuit of education in a particular environment and protecting the free flow of information so that the selection of the most appropriate educational environment can be made by students and parents. Applying intermediate scrutiny, the trial court and the Sixth Circuit Panel agreed that,

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[16] While the District Court held that the TSSAA's interest in fostering a "level playing field" was a legitimate governmental interest, it found that this interest was not substantial, especially because "[t]he substantial governmental interest in informed school choice trumps any governmental interest in controlling which schools or teams win athletic contests." 304 F. Supp. 2d 981, 994.

as applied to Brentwood under the facts of this case the Recruiting Rule was unconstitutionally overboard.

2. The Recruiting Rule is Not Narrowly Tailored

Assuming for the purpose of this case that the Recruiting Rule is content neutral[17], that Rule is nevertheless

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[17] At an earlier stage in this case, the Sixth Circuit had held that the Recruiting Rule was "content neutral." 262 F.3d 543, 554 (6th Cir.2001); *see also* 442 F.3d 410, 421.

In its initial determination that the Recruiting Rule is content neutral, the Court of Appeals misinterpreted the language of the Rule, and found that the "greatest restriction" imposed is the "prohibition on coaches, coaching staff, and school representatives from initiating contact with middle school students for the purpose of recruiting students athletes. (262 F.3d 543, 552 (emphasis added).) So interpreted (or tailored) by that court, the ban on "initiating conduct" could pass muster because there are "multiple ways of communicating with middle school students to provide them with information about the academic, athletic and spiritual aspects of the education experience at Brentwood." *Id.*

There are several problems with the Sixth Circuit's approach beyond its dismissive treatment of "undue influence."

First, the Rule is not merely designed to prohibit or limit "initial" contact. The "recruiting rule" itself does not even mention "initial contact." The "Guidelines for Understanding The 'Recruiting Rule' and Understanding 'What Is Undue Influence?'" explicitly states:

> 1. The major theme of the "recruiting rule" is not "initial contact." The major theme is "exceeding what is normal and appropriate." Initial contact can be a violation, but is only one of many things that can exceed what is normal and appropriate.

The Circuit Court disregarded this language. Moreover, Question 5, Guideline 4 is explicit that "Pre-arranged contact [between any representative of a school and any prospective student] is seen in the same manner as initial contact." 304 F. Supp. 2d 981, 986.

(continued...)

constitutionally infirm. Content-neutral regulations will be sustained only "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of [government's legitimate] interest." *United States v. O'Brien,* 391 U.S. 367, 377 (1968). The Rule is not narrowly tailored because it burdens "substantially more speech than is necessary" to further the government's interest in keeping athletics subordinate to academics and in preventing exploitation of student-athletes. *See Ward v. Rock Against Racism,* 491 U.S. 781, 799 (1989); *see also Thompson v. Western States Medical Center,* 535 U.S. 357, 373 (2002).

TSSAA's legitimate interest in keeping athletics subordinate to academics and preventing exploitation of student-athletes could be better served by means less intrusive on speech than the Recruiting Rule ban, such as requiring parental consultation and consent, review of the student's academic record by coaches together with other members of the faculty or school administration, establishing a meaningful minimum grade-point average for eligibility to engage in intermural sports, etc.

The Rule's ban on any contact with a student before the student has actually attended three days of class (see 304 F.Supp.2d at 986) has the effect of preventing a school other

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[17](...continued)

Second, as read by the Sixth Circuit panel, the Recruiting Rule is irrelevant to the Brentwood Spring Practice Letter and the phone calls because there had been substantial contact between the school and the 12 students long before the coach's letter.

Third, as read by the Court of Appeals panel, most of the Rule's content related proscriptions would be eliminated after some "initial" contact initiated by parents or students, or, perhaps, even the headmaster or academic staff of the school, rather than the coach. Such a rule makes no sense in light of the governmental interest in ensuring primacy of academic pursuits and avoidance of exploiting students, and provides opportunities for subterfuge.

than a traditional district school with a "feeder pattern" from giving any information about its programs to a student, and does not merely prevent "undue" influence. The ban is simply not the "least restrictive means" for preventing harm to student-athletes.[18]

The dimensions of the type of recruiting rule suggested by the District Court (*see* 13 F.Supp.2d 670, 690) would serve the dual governmental interests of protecting free communication from educators while controlling disruptive athletic recruiting which could detract from the primacy of schools' education focus.

The state's interest in keeping athletics subordinate to academics and its interest in preventing the exploitation of students are undoubtedly compelling. But the Recruiting Rule is not narrowly drawn to fit either of these interests.[19] The Recruiting Rule is hardly the least restrictive means to further the state's interests in keeping athletics subordinate to academics and in preventing the exploitation of students.

There are many alternatives that would be more narrowly drawn, and some that would not burden speech at all. Indeed, TSSAA already has rules and guidelines that serve the state's legitimate interests. TSSAA has banned spring practice for incoming students. *See* 442 F.3d at 410. The Recruiting Rule prohibits fraudulent, coercive or harassing conduct, such as "offering an incentive or inducement to a student." *See* 304 F. Supp. 2d 981, 984, 985. Other rules restrict current high school

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[18] The Court of Appeals observed that the fact that the rule was subsequently changed to prevent participation in spring practice by students who were not yet attending the school "bolsters the conclusion that the TSSAA's punishment of Brentwood in this case was not narrowly tailored. 442 F.3d 410, 429.

[19] The "D-" requirement of the current TSSAA rules (*see* 442 F.3d 410, 418) is ludicrous, and shows that in fact TSSAA does not really exalt academics over athletics.

students' ability to transfer to other schools for athletic purposes by limiting their athletic eligibility and by making schools forfeit games in which ineligible students participate. *Id.*

Another TSSAA rule provides that "[s]tudents shall be regularly enrolled, in regular attendance, and carrying at least five full courses." At present, students must earn at least a "D-" in all of their courses to be eligible for inter-school athletic competition. *See* TSSAA Bylaws, under Article II (Eligibility Rules), Section 1 (Academic Rules), described at 442 F.3d 410, 418. TSSAA could have ensured the subordination of athletics to academics and prevented the exploitation of students not by inhibiting information about the school, but by requiring better academic performance from student-athletes as a condition of eligibility.

As the district court observed, "...the Rule's ban has the effect of preventing *any* influence on a student, not just "undue" influence. The ban is simply not the "least restrictive means" for preventing harm to student-athletes." 13 F.Supp.2d 670, 690.

The Recruiting Rule's ban on speech to parents deserves special emphasis in any discussion of its overbreadth. It is troubling enough to argue that children must be sheltered from information about their educational options, but it is especially offensive to conclude that the First Amendment permits a state actor to insist that parents must be left ignorant of such options.

There is no justification for proscribing and penalizing Brentwood's communication about a permissible activity. The Rule "stifles speech on account of its message. . .[and] pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Simon & Schuster, Inc, v. Members of State Crime Victims Bd.*, 502 U.S. 105(1991).

The "initial contact" approach which the Sixth Circuit devised fails to address the kind of recruiting the District Court properly found to be offensive and would create an arbitrary and possibly insurmountable barrier to non-traditional schools' efforts to get their message to parents and prospective students. The Rule as rewritten by the Circuit Court would be particularly harmful to charter schools and other alternative schools. Many parents, particularly in poor urban areas (where charter schools and magnet schools are very often established), do not see or hear, nor do they respond to, advertisements or general dissemination of information about educational choices. The very notion of choice in education is foreign to many prospective charter parents. Banning or limiting "initial" contact by a representative of the school would have a serious chilling effect on enrollment and the character of the student body charters and other alternative schools seek. (*See* the expert testimony at trial, summarized by the district court, 304 F.Supp.2d 981, 991.)